(3)

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1942

WILLIAM DUDLEY PELLEY,
Petitioner and Appellant Below,
vs.
UNITED STATES OF AMERICA,
Respondent and Appellee Below.
No. 645

LAWRENCE A. BROWN,
Petitioner and Appellant Below,
vs.
UNITED STATES OF AMERICA,
Respondent and Appellee Below.
No. 646

FELLOWSHIP PRESS, INC.,
Petitioner and Appellant Below,
vs.
UNITED STATES OF AMERICA,
Respondent and Appellee Below.
No. 647

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT
PETITION FOR REHEARING WITH CERTIFICATE OF COUNSEL AND BRIEF IN SUPPORT THEREOF.

OSCAR F. SMITH,
Indianapolis, Indiana,
FLOYD G. CHRISTIAN,
Noblesville, Indiana,
Counsel for Petitioners.

Central Publishing Company, Indianapolis, Ind.

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PETITION FOR REHEARING WITH CERTIFICATE OF COUNSEL AND BRIEF IN SUPPORT THEREOF.

TO THE SUPREME COURT OF THE UNITED STATES AND THE HONORABLE JUDGES THEREOF:

Comes now William Dudley Pelley, Lawrence A. Brown,

and Fellowship Press, Inc., petitioners and appellants below, in the above entitled cause, and present this their joint and several petition for a rehearing of their joint and separate petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit, and in support thereof, respectfully show:

I.

Denial of the joint and separate petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit leaves undecided a question of law that was decided by the Honorable District Court and the Honorable Circuit Court of Appeals, contrary to and in contravention of Amendments Five and Nineteen to the Constitution of the United States; and in conflict with the applicable decisions of this Honorable Court and the statutes of the United States.

II.

In passing upon the pleas in abatement the Honorable Circuit Court erred in deciding that there was no evidence that there were no names of women among those supplied and placed in the box from which the names of the grand jurors (who composed the grand jury which returned the indictment herein) were drawn. (R. pp. 265, 266, 274, 275, 276, 277, 278, 279, and 280.)

III.

The Honorable Circuit Court of Appeals for the Seventh Circuit erred in deciding that there is a distinction between this case and cases where persons of defendants' race or creed were intentionally excluded from grand juries, and that therefore no prejudice to the case of petitioners is shown or inferable, or in conflict with the applicable decisions of this Honorable Court.

IV.

The Decision of the Honorable Circuit Court is in oppo-

sition to Amendment Five of the Constitution of the United States, for the reason that it held in effect that even though certain classes of citizens are excluded from a grand jury, only those who belong to the excluded classes can complain of the exclusion. This Constitutional provision demands an indictment by a properly constituted grand jury impartially selected according to due process of law, and so as not to deny a citizen the equal protection of the laws. The denial of the petition for a writ does not settle this question as to petitioners, and it leaves this unsettled question of law open and a detriment to the citizens as well as to the Government.

V.

The denial of the petition for the writ herein affirms the decision of the Honorable Circuit Court, and is in conflict with the decision of this Honorable Court entitled Neal vs. Delaware, 103 U. S. 370, 26 L. Ed. 567, and is contrary to the due process clause of the Fifth Amendment of the Constitution. The denial of the petition herein affirms the decision of the Honorable Circuit Court of Appeals, and eliminates any presumption that the petitioners were harmed by the exclusion of women from the grand jury in the absence of a showing to the contrary. Petitioners' rights under the Constitution are inalienable.

Constitution of the United States Amendment Five;
6 R. C. L. (Const. Law) Sec. 437, 438, 439, and 440, Vol. 6 pp. 441 to 446, and authorities cited in footnotes thereto;
Ex Parte Wilson, 114 U. S. 417;
Ex Parte Bain, 121 U. S. 1.

VI.

The Act of Congress of June 30, 1906, Chapter 3935 (34 Stat. 816, 5 U. S. C. A. 310), is unconstitutional, and the decisions of the Courts on the question of unauthorized

persons appearing before the grand jury are not uniform. Under the present decisions, considering the above Act, without the determination of the question of the constitutionality, or interpretation of this Act, and without this Honorable Court's settling the questions of law on this point, the injury done to the public outweighs that suffered by the defendants, and there is great need throughout the Country for this Court's ruling for the protection of the Government and the citizens. The denial of the petition herein can not settle this question. A justified illegality, however trivial of itself, is of the highest importance.

VII.

Congress did not intend, by the Act of June 30, 1906, to authorize the Executive Department of the Government, the Attorney General and/or his special assistants, to appear before the grand jury, take full charge of the investigations, and conduct the same—to invade the Judicial Department, supplanting the District Attorney, to the injury of both the Government and the accused. There is a crying need that this question be settled. To permit the matter to stand is sanctioning the Executive Department's invasion of the Judicial Department, contrary to the Fifth Amendment of the Constitution. From very early times the proceedings before the grand jury, in taking testimony and deliberating thereon, were required to be held in secret. It is a rule of universal application, wherever the system of grand juries is in effect. This rule rests upon public policy and in furtherance of justice. It is intended for the protection of the Government and the citizen. When a special assistant to the Attorney General of the United States appears with the District Attorney in such grand jury proceedings under the authority of the Act of June 30, 1906, the rights secured by the well established rule are invaded with detriment to both the Government and the citizen.

VIII.

The decision of the Honorable Circuit Court of Appeals in this case as to the sufficiency of the indictment is in conflict with the decision of the Circuit Court of Appeals for the Ninth Circuit on the same matter, in the cases decided by the Ninth Circuit, entitled FOSTER, ET AL. v. UNITED STATES, 253 FED. 481; SHILTER v. UNITED STATES, 257 FED. 724; and also with the decision of the Circuit Court of Appeals for the Eighth Circuit on the same matter in a case decided by the Eighth Circuit, entitled MARTIN v. UNITED STATES, 168 FED. 198, and is in conflict with the Fifth and Sixth Amendments to the Constitution of the United States, and in order that the Government and the citizens may be reconciled, it becomes necessary that this Honorable Court enunciate clearly and distinctly the law for the guidance of all.

IX.

If the indictment was good on demurrers, then the decision of the Honorable Circuit Court of Appeals herein was in conflict with the decision of this Court, in the case entitled, KIRBY v. UNITED STATES, 174 U. S. 47; and also with the decision of the Circuit Court of Appeals for the Ninth Circuit, entitled FOSTER, ET AL., v. UNITED STATES, 253 Fed. 481, and the petitioners' motion for a bill of particulars should have been sustained. Petitioners' rights should be clearly established by this Court, and in doing so it will enure to the benefit of the Government and the citizens.

X.

The Honorable Circuit of Appeals for the Seventh Circuit did not decide the questions presented to it as to the admissibility of certain evidence, consisting of Government Exhibits numbered 13, 15, 16, 17-A, 18, 20, 30, 33-A, 33-B, 33-C, 33-D, and 34, which consisted of publications from the

year 1933 to the year 1939 (R. pp. 308, 338, 497, 498, 505, and 513), which said failure to decide is in conflict with the decision of the same Court with respect to the admission in evidence of statements and testimony of conversations of past events in the case entitled COLLENGER v. UNITED STATES (C. C. A. 7th), 50 Fed. (2d) 345, in that said Exhibits and statements were not confined to the one who wrote or uttered them but were permitted to be used with equal force against petitioners Brown and Fellowship Press, Inc.

WHEREFORE, Upon the foregoing grounds, it is respectfully urged that this petition for a rehearing be granted, and that the decree of this Honorable Court denying petitioners' joint and separate petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit be set aside and said petition granted.

Respectfully submitted,
OSCAR F. SMITH,
FLOYD G. CHRISTIAN.
Counsel for Petitioners.

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BRIEF IN SUPPORT OF PETITION FOR REHEARING

MAY IT PLEASE THE COURT:

OPINION BELOW

The opinion of the Circuit Court of Appeals for the Seventh Circuit is reported in 132 Federal (2d) 170.

JURISDICTION

This was correctly stated by respondent.

QUESTIONS PRESENTED

Points 1, 2, and 3 of respondent's brief were correctly stated.

STATUTES INVOLVED

The statutes cited by respondent were correctly copied, but petitioners desire to set out in addition thereto Revised Statutes, Sec. 771 (28 U. S. C. A. 485), defining the duties of District Attorneys; and Revised Statutes, Sec. 363 (5 U. S. C. A. 312), pertaining to counsel to aid District Attorneys; and Revised Statutes, Sec. 366 (43 Stat. 1029; 5 U. S. C. A. 315), authorizing the appointment and prescribing the oath of special attorneys or counsel, which are set forth in the Appendix hereto at p. 67.

STATEMENT

Under this heading respondent has in substance correctly stated the record pertaining to the convictions of petitioners Pelley and Fellowship Press, Inc., under Counts 1 to 5 and 7 to 12, inclusive, and petitioner Brown under Count 12 (R. 573), and also has correctly stated in substance the alleged violations of Section III of the Sedition Act as attempted to be charged in Counts 1 to 5 and 7 to 12 of the indictment. The respondent has correctly stated the sentence and fine pertaining to the petitioners. The summarization of the indictment is fairly well stated, with the exception that on page 6 of respondent's brief the scrivener appears to have injected his conclusions by the use of such words as "deleterious effects," and "castigated"; and with the exception that certain statements were alleged in each count numbered 1 to 5 and 7 to 9 to have been false, by

conclusion only. The United States did not allege any facts showing the falsity and did not set out in either count what it asserted the truth to be in contrast to such statements.

ARGUMENT

Upon the date this Honorable Court denied the Petition for certiorari herein, we had a reply brief in the hands of the printer in which we had outlined the following argument which we believe may be pertinent to the petition herein:

I

PLEAS IN ABATEMENT

1. Petitioners most earnestly and respectfully submit that the trial court erred in overruling their pleas in abatement because women were improperly excluded from the grand jury which returned this indictment, while at the time there resided in the district a large number of women who had the qualifications necessary to have their names placed in the jury box to be drawn, and to sit as grand jurors on the grand jury that returned the indictment herein. (R. 265.)

Quoting from the testimony of Albert C. Sogemeier, clerk:

"The last time names were placed in the jury box was approximately December 28, 1941. Some time in the spring of 1941 we wrote letters for the names of prospective jurors. No names have been placed in the jury box since that time. Over fourteen hundred names were placed in the jury box at that time. Our practice was to write a letter to the judge of each Circuit Court in each county in our district, and when the names were furnished by the various judges of the state Circuit Courts the names were typed on small pieces of paper called 'tickets' and placed in an envelope marked with the name of the county from which they were

received, until all of the names were received. Then the envelopes were held until we placed them in the box. We knew what names we had in each county before we placed them in the box. We kept more than three hundred in the box all the time. We divided the envelopes between the jury commissioner and myself and placed the names therein alternately. We did not go into the qualifications of the persons whose names we thus obtained and made no special effort to ascertain whether those persons were men or women. I do not know whether there were any women's names placed in the box at the last times we placed names therein." (R. 265-266.)

On May 3, 1942, the Honorable District Court below ordered the clerk and the jury commissioner to draw for grand jury service at Indianapolis for the May, 1942, Term, the names of fifty-five persons who were legally qualified for service as jurors. Names were drawn (Government's "Exhibit B," R. 273-274), and on May 5, 1942, the clerk of said court and the jury commissioner reported the fifty-five names so drawn to the court (Government's "Exhibit C," R. 274-275-276); on May 5, 1942, summons was issued, and fifty-four names appear on that list (Government's "Exhibit D," R. 276-277-278). By comparing Government's "Exhibit C" (R. 274-276) with Government's "Exhibit D" (R. 276-278) it will be observed that the names are identical on each one of these lists, with the exception that the name "James Lynn" does not appear in Government's "Exhibit D" among those summoned. The names drawn consisted entirely of those of men.

On June 1, 1942, the grand jury was impaneled (Government's "Exhibit E" (R. 278-279), and twenty-three names were drawn and summoned as members of the grand jury, who were found to have the proper qualifications for grand jurors. Lilburn Jackson was thereupon appointed foreman,

and said foreman and grand jury were duly impaneled and sworn and charged according to law, and retired to their room to consider the business before them; twenty-eight of those so summoned were excused and discharged from serving as grand jurors as directed in the summons served upon them. (R. 279-280.) Lilburn Jackson, foreman, filed with the clerk of the court a record of twenty-three grand jurors concurring in the finding of the indictment with respect to petitioners Pelly (R. 281), Brown (R. 282), and Fellowship Press, Inc. (R. 283).

It will be observed that out of the fifty-five names the twenty-three members of the grand jury were chosen.

The clerk of the District Court testified, "We kept more than three hundred in the box all the time." (R. 266.)

Again the clerk said: "The last time names were placed in the jury box was approximately December 28, 1941. Some time in the spring of 1941 we wrote letters for the names of prospective jurors. No names have been placed in the jury box since that time. Over fourteen hundred names were placed in the jury box at that time. Our practice was to write a letter to the judge of each Circuit Court in each county in our district and when the names were furnished by the various judges of the state Circuit Courts the names were typed on small pieces of paper, called 'tickets,' and placed in an envelope marked with the name of the county from which they were received until all the names were received. Then the envelopes were held until we placed them in the box." (R. p. 265-266.) * * * "We knew what names we had in each county, before we placed them in the box." (R. 266.)

The clerk said, "We did not go into the qualifications of the persons whose names we thus obtained, and made no special effort to ascertain whether those persons were

men or women." (R. 266.) Can it be said that there is any ambiguity to be resolved in favor of any party hereto?

We can find nothing better than that which was said by the Honorable Merrill E. Otis in his article which appeared in the American Bar Journal of January, 1943, page 20, wherein he said: "I constructed a composite. This is the composite: 'To be qualified for jury service men and women must be citizens, voters, taxpayers; sober, discreet, judicious; intelligent, well informed, experienced; esteemed in the communities in which they live for character, integrity and sound judgment.' So the American people have written in their statutes what they think should be the qualifications of jurors."

The sum and substance of this matter is that the clerk and jury commissioner simply delegated their authority to the various county circuit judges to select the names to be placed in the grand jury box, and the fact that theretofore for many years it had been the custom to request the names of "good and capable men" from the county circuit judges coupled with the fact that no woman had up to and including the time of this trial ever served as a grand or petit juror in the District Court below, coupled with the fact that the fifty-five names so drawn did not contain the names of any women, and that this grand jury was composed entirely of men, is evidence that no names of women were ever placed in the grand jury box. If no names of women were ever placed in the jury box, it necessarily follows that the names of women were excluded therefrom, else at some time or other the name of some woman would have appeared.

On page 8 of its brief the respondent concedes that the clerk and jury commissioner made no examination or special effort to ascertain whether the names of women were

included. It was the duty of those officials to see to it that the names placed therein impartially reflected a cross section of the community. In respondent's brief at page 8 it is said: "The evidence requires the conclusion that they personally prepared the list, since they knew the names obtained from each county before placing them in the box (R. 266)"—if they knew the names then they knew that the names of no women were ever placed in the box, else the clerk who testified as a witness would have said in response to the various questions propounded to him concerning that matter, that there were names of women included. However, the clerk said: "I do not know whether there were any women's names placed in the box at the last time we placed names therein. It has been the practice of sending lists to the various judges ever since I have been in office." (R. 266.)

The respondent says in note 8 at page 8 of its brief: "Even assuming a technical irregularity because of the omission of women, the court below held there would not have been error because no prejudice to petitioners' case was shown (R. 661), nor was any inferable, since neither of them are of the sex alleged to have been excluded."

In cases arising between several of the states and colored defendants upon the issue as to whether the members of that race were denied the equal protection of the law under the Constitution of the United States Amendment 14, the questions differed from that here presented for here (and we think for the first time) is presented the question as to whether or not the exclusion of any class of qualified citizens is in violation of Amendment 5 of the United States Constitution. This amendment unmistakably contemplates that juries and grand

juries must be impartially obtained and selected from the citizenry at large without any taint of discrimination; and it follows that it was the imperative duty of the clerk and jury commissioner to make certain that the names placed therein and the manner of obtaining the names did not work a discrimination.

Under our form of government it has always been recognized and for that matter recognized in the Kingdom of England since the time of the Magna Charta that juries must be free, fair, and impartial, and selected by "blind justice."

If by subterfuge or negligence the officials chargeable with the grave and sacred duty of selecting impartial jurors can be permitted to accept names furnished by county judges, without examining the names even so casually as to notice whether or not the names were those of men or women or both, and without ascertaining whether such names reflect a cross section of the community at large, then the 5th Amendment to the Constitution of the United States can and will be defeated, not only to the detriment of the citizens but to the government of the United States itself.

The fact that the clerk did not know whether the names of any women were placed in the box among fourteen hundred names placed therein can mean but one thing: The clerk and jury commissioner paid little or no attention to the names except to place them in the box, depending entirely upon the county judges throughout the district to perform the duties of selecting the names and passing upon the qualifications. Thus their authority was delegated to the county judges. The clerk testified: "We did not go into the qualifications of the persons whose names we thus obtained * * *." (R. 266.)

The grave investigations which grand jurors are called upon to make involve the fundamental liberties of the people of the United States and the rights of the citizens which constitute the foundation of this government. To close our eyes and say that because the petitioners consist of men and a corporation and therefore because women were excluded that the duty devolves upon them of showing that they were harmed before they can avail themselves of their constitutional rights under the 5th Amendment might be said to be almost frivolous. If it is to be held that the exclusion of women works no hardship in cases where men are indicted, then it can also be said that the exclusion of members of a political party is likewise harmless unless the indicted persons were members of that political party. It could also be said that the fact that Catholics were excluded, or that Protestants were excluded, would be harmless unless the persons indicted were members of the excluded faith.

Under the law qualified women are just as capable as men of acting as jurors. The mental make-up of women, their experiences in life which may differ somewhat from those of men, their inclination to mercy, and their natural traits of caution and intuition might result in a different conception when their views and experiences and natural reactions were discussed with men on the grand jury. At least no one can say what the result of an investigation made by a jury of mixed sexes would be as compared to a result where men only or women only constituted the grand jury.

For illustration, suppose that men were excluded from jury service and a grand jury entirely composed of women indicted a woman, could it be believed that such a procedure would be fair under Amendment 5 of the Constitution? It might be said that women might be more

willing to condemn a woman than they would a man, and vice versa; as in this case, it might be said that men would be more willing to condemn a man. The wisdom of the provisions of the 5th Amendment are apparent and it was designed to avoid one of the very things that has occurred in this case.

The 5th Amendment to the effect that no person shall be held to answer for capital or other infamous crime unless on presentment or indictment by grand jury; nor be deprived of life, liberty, or property, without due process of law, necessarily mean that an indictment must be the technical result of the investigations and deliberations of a grand jury properly and legally impaneled throughout and impaneled as the result of "due process of law."

The words "due process of law" were undoubtedly intended to convey the same meaning as the words "by the law of the land" in the Magna Charta. Lord Coke in his commentary on those words (2 Inst. 50) says that they mean, "due process of law." The Constitutions which had been adopted by the several states during the formative period of the Federal Constitution following the language of the Magna Charta generally contained the words, "by the judgment of his peers, or the law of the land." The ordinance of Congress of July 17, 1787, for the government of the territory of the United States northwest of the River Ohio used the words.

The Constitution of the United States as adopted contained the provision that "the trial of all crimes, except in cases of impeachment, shall be by jury." When the 5th Amendment was made, the trial by jury in criminal cases had thus already been provided for.

Den & Murray v. Hoboken Land & Improvement Co., 59 U. S. 272, 15 L. Ed. 372, 18 How. 277.

Perhaps no definition is more often quoted than that given by Mr. Webster in the Dartmouth College case: "By the law of the land is most clearly intended the general law, a law which hears before it condemns, which proceeds upon inquiry, and renders judgments only after trial." The meaning is that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society.

Lest the right of trial by jury be nullified by the improper constitution of juries the notion of what a proper jury is, has become inextricably intertwined with the idea of jury trial. For the mechanics of a trial by jury we revert to the common law that existed in this country and England before the Constitution was adopted.

Patton v. United States, 281 U. S. 276.

"But even as jury trial, which was a privilege at common law, has become a right with us, so also whatever limitations were inherent in the historical common law concept of the jury as a body of one's peers do not prevail in this country. Our notions of what a proper jury is, have developed in harmony with our basic concepts of a democratic society and a representative government. For it is a part of the established trend in the use of juries as instruments of public justice that the jury be a body strictly representative of the community."

Smith v. Texas, 311 U. S. 128, 130.

Tendencies no matter how slight toward the selection of grand jurors by any method other than that which will insure a fair and impartial investigation should be sturdily resisted. "That the motives inflicting such tendencies may be of the best must not blind us to the dangers of allowing any encroachment whatever on this es-

sential right. Steps innocently taken may one by one lead to the irretrievable impairment of substantial liberty."

"The deliberate selection of jurors from the membership of particular private organizations definitely does not conform to the traditional requirements of jury trial. No matter how high principled and imbued with the duties to vindicate public virtues such organizations may be, the dangers inherent in such a method of selection are the more real when the members of those organizations from training or otherwise acquire a bias in favor of the prosecution. The jury selected from the membership of such an organization is then not only the organ of a special class, but, in addition, it is also openly partisan. If such practices are to be countenanced, the hard won right of trial by jury becomes a thing of doubtful value, lacking one of the essential characteristics that have made it a cherished feature of our institutions." Quoted from

Glasser v. United States, 315 U. S. 60, pp. 85 and 86.

"The Constitution (Const. Amend. 5) provides that one charged with certain offenses shall not be placed upon trial until the grand jury shall have investigated the subject matter of the offense alleged in the indictment, and returned a true bill thereon. To this end certain formalities must be complied with obtaining the grand jury as well as in the preparation and presentation of the bill to the grand jury. Technically speaking, such paper can not be called a bill of indictment until it is found 'a true bill' by a properly constituted grand jury." Quoted from

Cooper v. United States (1917), 247 Fed. 45, 159 C. C. A. 263.

The Bill of Rights of the Federal Constitution is a limitation upon the powers of the national government, restricting it from encroaching in the slightest upon the protective provisions thereof. To permit the exclusion of women from a grand jury is in effect permitting the Federal government to destroy the rights guaranteed by the Bill.

To say that because one indicted does not belong to a class which is excluded from grand jury service and therefore was not harmed thereby is in the nature of a subterfuge which, if it can be used at all may be used in its greatest extremity and thus to destroy not only one of the rights but all. These restrictions and limitations upon the Federal government, prohibiting it from encroaching in the least upon the rights as guaranteed by the Bill apply with equal force to the executive, legislative, and judicial branches of the government.

In order to insure this position, Amendment 10 was added to the Constitution (quoting): "The powers not delegated to the United States by the Constitution nor prohibited by it to the states are reserved to the states respectively or to the people." The purpose of this amendment was to put beyond all dispute the fact that all powers not granted by the Constitution to the Federal government are reserved to the people. Kansas v. Colorado, 206 U. S. 46. It necessarily follows that the people of the United States have a right to insist that a grand jury shall be fairly and impartially selected from a cross section of the community without regard to sex, race, faith, political affiliation, or previous condition of servitude.

Amendment 9 of the Constitution is another safeguard of the Bill of Rights wherein it provides: "The enumeration in the Constitution of certain rights shall not be

construed to deny or disparage others retained by the people." Thus it will be seen that the rights conferred under the Bill of Rights are exclusive and inalienable and can not be encroached upon or taken away from any citizen by the Federal government upon any pretext or by any method or in any manner. It must be presumed that whenever there is an encroachment upon the liberties guaranteed by the Bill of Rights, such is not only harmful to the person whose right has been transgressed but to the people of the United States.

The American Bill of Rights is a reservation of a limited individual sovereignty, the purpose of which is to declare those fundamental principles of the common law generally called the "Principles of English Constitutional Liberty," which the American people always claimed as their English inheritance and the defense of which was their justification for the war of the Revolution.

Orr v. Quimby, 54 N. H. 590, 613.

"No rights can be acquired under the Constitution or the laws of the United States except such as the government of the United States has the authority to grant or secure." The Bill of Rights is under the protection and guaranteed by the United States.

United States v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588.

If the legislative department of the government were at this time to enact a statute prohibiting a certain class of qualified citizens from sitting on grand juries in United States courts, it could not be doubted but that such a statute would be unconstitutional. If this be true, as it undoubtedly is, how can it be said that the judicial department—the source and foundation of justice itself—has yet the author-

ity to render lawful that which, if done under express legislative sanction, would be violative of the Constitution? If such power obtains then the Judicial Department of the Government sitting to uphold and enforce the Constitution is the only one possessing the power to destroy it. If such authority exists, then in consequence of their establishment, to compel obedience to law, and to enforce justice courts possess the right to inflict the very wrongs which they were created to prevent.

In Galpin v. Page, 18 Wall. 350, the Court said at p. 368: "It is a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has had his day in court, by which is meant until he has been duly cited to appear and has been afforded an opportunity to be heard. Judgment without citation and opportunity wants all the attributes of a judicial determination. It is a judicial usurpation and oppression and can never be upheld where justice is justly administered."

The general Constitutional guaranties are simply a protection to the fundamental or inherent rights which are common to all citizens. Such Constitutional provisions are a guaranty of rights, and not a limitation of them. (State v. Nelson, 19 R. I. 467, 34 A. 990; Ekern v. McGovern, 154 Wisconsin 157, 142 N. W. 595. The guaranties and the rights so secured may not be made to yield to mere convenience. Weaver v. Palmer Brothers Co., 270 U. S. 402, 70 L. ed. 642 46 S. C. 320). If not warranted by any just occasion the least imposition is oppressive. (Lawrence v. State Tax Commission, 286 U. S. 276, 76 L. ed. 1102; 52 S. C. 556). The guarantee insures the citizen the privilege of having such a right judicially declared and protected. (Lawrence v. State Tax Commission, 286 U. S. 276). The Bill of Rights constitutes a limitation upon the powers of every department of the government, which means that the

rights thereby reserved and guaranteed to the people are protected from arbitrary invasion or impairment from any governmental quarters; (11 Am. Jur. 1092) and is a restriction on the legislative as well as on the executive and judicial powers of the government and can not be so construed so as to leave any department free to make any process "due process of law" by its mere will.

Murray v. Hoboken Land, etc., Co., 18 How. 272, 15 L. ed. 372;

Logan v. United States, 144 U. S. 263.

The first ten Amendments to the Federal Constitution were adopted almost immediately after the adoption of the Constitution itself, and are in the nature of a Bill of Rights. The adoption was insisted on and took place in order to quiet the apprehension of many that without some such declaration of rights the government would assume, and might be held to possess the power to trespass upon those rights of persons and property which by the Declaration of Independence were affirmed to be inalienable rights.

Monongahela Navigation Co. v. United States, 148 U. S. 312, 37 L. ed. 463, 13 S. C. Rep. 622.

The founders of our government in writing the Constitution assumed the liberties of the people to be firmly established and did not write them into the Constitution. The people of this country, however, having had experience under the British Crown with Writs of Assistance, refused to accept the Constitution until assured of the adoption of Amendments which would enumerate and preserve the liberties under a written Constitution. Accordingly there was immediately adopted the Bill of Rights contained in the first ten Amendments to the Federal Constitution.

Allen v. State, 183 Wis. 323, 197 N. W. 808.

We therefore most earnestly contend that the opinion of the court below is erroneous wherein it is in effect held that the exclusion of women from the grand jury "at most is an irregularity without implication of injury"; and that it was for the petitioners to show prejudice to their rights. If the rights existed such rights must have been prejudiced if they were transgressed.

The exclusion of women from the grand jury was more than a mere "irregularity"—it was more than a mere technical error, for the organization of the grand jury itself was *void* and all of the proceedings of that pretended body were void. In other words it was not a grand jury, for it did not conform to that which the law requires. Can it be said that a body of men pretending to be a grand jury, although their pretense is not founded upon lawful procedure can return a valid indictment? The court below said that no prejudice to petitioners' case was shown nor was any inferable. We believe that when it is shown that a Constitutional right pertaining to the liberty of citizens is transgressed, that at least some prejudice is inferable. We can conceive of no greater ground for an inference of prejudice under our law, than a violation of a Constitutional right. It was not necessary to draw inferences or to examine the case as to whether or not an inference was afforded. The fact that women were excluded from the grand jury simply renders the entire proceeding void; a nullity and *coram non judice.* If it were a mere error or mere irregularity it might be said to be different, but the method pursued in obtaining this grand jury leaves no room for equivocation, it is not a voidable proceeding requiring the petitioners to do something to avoid the wrong for this they had no opportunity to do; they could not prevent this unauthorized body, whose actions were void in their inception from returning an indictment into court. An unau-

thorized body pretending to be a grand jury has no legal existence and anything it attempts to do is void. There is only one kind of a grand jury which is recognized by the law of the United States, and that is one which is regularly and lawfully drawn in all of the particulars necessary to the drawing and impaneling thereof. A body of men unlawfully selected and/or obtained for such purpose constitutes nothing but a mere unauthorized body of men in the same legal category as a mob. So that in this case we are dealing with an indictment presented by a body of men whose very existence as a body was void in the first place; hence we are not dealing with mere irregularities, inferences, or errors. This body was either a grand jury or it was nothing. If the petitioners had the Constitutional right to have a representative cross section of the community tapped for grand jurors in the lawful way without the exclusion of any class of qualified persons, and such was not strictly adhered to by the authorities charged with the duties pertaining thereto, then all that has resulted was void. The petitioners at their earliest opportunity filed their plea in abatement followed by motions to quash the indictment, for the very reasons which we are here urging.

The doctrine which we here seek to promulgate is somewhat similar to the doctrine that an offense created by an unconstitutional law is not a crime and that a conviction under it is not merely erroneous, but is illegal and void. Although an unconstitutional law has the form and name of law, it is in reality no law, but is wholly void. Ex Parte Royall, 117 U. S. 241; Ex Parte Siebold, 100 U. S. 371; Cohen v. Virginia, 6 Wheat. (U. S.) 264; Chicago R. Co. v. Hackett, 228 U. S. 559. Such a statute imposes no duties, confers no rights, and bestows no power or authority on anyone. A grand jury though having the form and name of law, is in reality no grand jury, and is simply an unauthor-

ized body of persons, and in legal contemplation as inoperative as if it had never been called or impaneled, where the grand jury is not drawn in strict accordance with the law. Such a body has no duties to perform, no rights, no powers, or authority, and its acts and deeds are initially and wholly void.

"It is a matter of the highest public policy that crime shall be punished by legal methods. When these are disregarded, there is the mob, between which, in the pursuit of vengeance, and the officers of the law, acting in its name, but in disregard of it, there is no distinction."

United States v. Edgerton (D. C., D. Mont. 1897), 80 Fed. 374, at p. 376.

Each of the rights contained in the first ten Amendments to the Constitution are unequivocally guaranteed to the citizens of this country, and must be held to be inviolable. This guaranty precludes any impairment whatsoever of these rights. It is beyond the power of the government to deprive a citizen of such rights or to work the slightest impairment thereof. Whenever such a right is impaired, transgressed or abolished, the question as to whether or not such impairment, transgression, or abolition was harmful, does not longer exist—the true and only question is whether or not the citizen's rights have been impaired, transgressed or abolished. To take away from a citizen any one of these rights necessarily results in harm to him, in great harm to him, for the rights would not have been given to the citizen in the first place if they were not very important to the preservation of his liberty. Liberty can not be taken away, impaired or transgressed upon without necessary harm. Liberty has always been held in this country to be of even greater importance than life itself. To say that one's liberty may be impaired or transgressed

and when such has been done that it is of no consequence unless he can show that he was harmed thereby is almost ludicrous. The Constitution guarantees the citizens untramelled liberty and that it will not be encroached upon by the slightest infraction. If we can go one step, even though it be very slight in encroaching upon the rights, then we can take another step of encroachment and still another and another until all liberty is destroyed. Nothing should be more seriously guarded against. If one right is taken from the edifice another may be taken until the entire edifice falls.

"With regard to those acknowledged rights and privileges of the citizen which form a part of his political inheritance derived from the mother country, and which were challenged and vindicated by the centuries of stubborn resistance to arbitrary power, they belong to him as a birthright, and it is the duty of the particular state of which he is a citizen to protect and enforce them, and to do nothing to deprive him of their full enjoyment. When any of these rights and privileges are secured in the Constitution of the United States only by declaration that the state or the United States shall not violate or abridge them, it is at once understood that they are not created or conferred by the Constitution but that the Constitution only guarantees that they shall not be impaired by the state or the United States as the case may be." (Quoted from Logan v. United States, 144 U. S. 263, 12 S. C. Rep. 617 at p. 624).

In the case of Ex Parte Virginia, 100 U. S. 339, the Supreme Court upheld the Civil Rights Act of March 1, 1875, enacting that no qualified citizen should be disqualified from jury service in a court of the United States or of any state on account of race, color or previous condition of servitude, and that any officer charged with the duty of selecting jurors who should exclude any such citizen for such cause should be guilty of a misdemeanor. It follows that if such a dis-

crimination constitutes a misdemeanor, then such rights which are attempted to be protected by that statute must be of at least some importance, and whenever a citizen is deprived of such rights he certainly must be harmed, else Congress would not have seen fit to pass this statute in the first place. The statute was a safe-guard to carry out the guaranty of the citizens' rights.

"The provisions embodying this guaranty have received a very broad and liberal interpretation, and it has been said that the guaranty is always and everywhere present to protect the citizen against arbitrary interference with his rights." (Quoted from 12 Am. Jur., p. 262, Sec. 569).

"The guarantees and the rights so secured may not be made to yield to mere convenience. If not warranted by any just occasion, *the least imposition is oppressive.*" (Our italics). (Quoted from 11 Am. Jur., p. 1093, Sec. 308).

Respondent says in note 8 of its brief at page 9, that there is serious doubt whether the ruling of the District Court on the plea in abatement was reviewable upon appeal; apparently depending upon Sec. 879 Title 28 U. S. C. (Sec. 1011 Revised Statutes). In reply to this permit us to say that the plea in abatement which was immediately filed after the return of the indictment herein is in the nature of an attack upon the jurisdiction of the court. In "Paragraph I" of the plea in abatement it is asserted that the exclusion of qualified persons of the female sex was contrary to the provisions of the United States statutes. (R. 66). In "Paragraph II" of the plea in abatement it was asserted that such exclusion was in contravention of the 5th, 14th and 19th Amendments to the Constitution of the United States, and in contravention of the statutes of the United States. (R. 66-67). In "Paragraph III" of the plea in abatement it was asserted that said exclusion of qualified

women from the grand jury was in violation of the Constitutional rights as guaranteed by Amendments 5, 14 and 19 of the Constitution. (R. 67). And in "Paragraph IV" of the plea in abatement it was asserted that the grand jury which found and returned the indictment herein "had no legal authority to inquire into the offense or offenses herein attempted to be charged, because women who were voters, freeholders and householders of this District and Division of Indiana, and who were eligible to serve as grand jurors upon the grand jury were excluded on account of the fact that names of such women were not placed in the box from which this purported grand jury was drawn, and no opportunity was afforded to draw the names of any of such women to serve upon the United States grand jury which found and returned the indictment herein. (R. 67).

2. In response to respondent's statement that "petitioners for the first time, make the extraordinary argument (Pet. 8-10, 9-33) that the Act of June 30, 1906, 34 Stat. 816, authorizing the Attorney General and his assistants to conduct grand jury proceedings is unconstitutional in that it permits 'an invasion of the Judiciary by the Executive Department of the Government,'" (Brief in Opposition 9-10); and the statement that "the contention is frivolous," we wish to say:

The plea in abatement was drawn upon the theory that the special assistants to the Attorney General "so appeared before the said grand jury without any legal right or authority." Thus from the inception of the case we took the position that the Act of June 30, 1906, was invalid. (R. 68, 69.) The Circuit Court of Appeals predicated its opinion as to this branch of the case upon this statute which is quoted therein. (R. 661, 662.)

The fact that the Attorney General has been vested

with powers over the legal affairs of the United States to the full extent that it falls within the Executive Branch of the Government (f U. S. C. 291), is not disputed. It appears from the opposition brief that counsel has overlooked the important phase of petitioners' contention, to-wit: "Unauthorized persons appeared before the grand jury." (Pet. 29-33.) These persons as pointed out in petitioners' petition, appeared and took charge of the grand jury investigation, including the duties of the District Attorney, under the pretended authority of the Act of Congress of June 30, 1906, which said Act petitioners most earnestly and sincerely contend is unconstitutional, in that it does permit "an invasion of the Judiciary by the Executive Department of the Government." Opposition cites United States v. San Jacinto Tin Co., 125 U. S. 273, 280, which petitioners respectfully submit is not in point with their contention herein. This case (a civil action) in substance holds that the initiation and control of such a suit lies with the Attorney General, as the head of one of the Executive Departments, and is analogous to a civil action brought by an individual plaintiff, in that the United States was the alleged wronged party plaintiff therein. There the Attorney General was authorized to appear in open court in the *trial* of the case. But in the case at bar we are confronted with a criminal prosecution wherein the United States sought to enforce the provisions of the criminal law; and two of the attorneys for the executive department appeared before the grand jury and took judicial part in the grand jury investigation. True, they appeared with the District Attorney—"it was a three horse team"—wherein the Honorable Mr. Ewing, special assistant to the Attorney General of the United States, "had charge of the investigation," and "had charge of the three horse team." (R.

284.) By the same token could it be said that the attorneys for the petitioners could have or should likewise have had the same right to appear before the grand jury in company with the District Attorney, as did the Honorable Mr. Ewing and the Honorable Mr. Schweinhaut, special assistants to the Attorney General? We submit that it is elementary that the laws of the land would not under any circumstances permit the accused's counsel to appear before the grand jury at the time the grand jury was investigating any alleged crime, and we submit that any law authorizing the appearance before the grand jury of the attorneys of the complaining party and taking charge of the grand jury proceedings, is likewise contrary to the law of the land and is unconstitutional. From our search it is apparent that the courts have been somewhat confused, and not altogether in accord, with respects to the right of special assistants to the Attorney General of the United States, to appear and conduct grand jury proceedings.

Grand jury proceedings should be conducted with the utmost secrecy, and no person other than a witness undergoing examination and the District Attorney should be present at the sessions. In the case of United States v. Edgerton (D. C. D. Mont. 1897), 80 Fed. 374 at page 376, with reference to unauthorized persons appearing before the grand jury, the Court said: "It is not susceptible of proof, nor the policy of the law to require it, and the injury done to the public in such case outweighs that suffered by the defendant." And again in the case of United States v. Rosenthal (C. C. S. D. N. Y. 1903), 121 Fed. 862, it was held in substance that special assistants to the Attorney General had no authority to represent the government, insofar as local judicial procedure in the various districts was concerned; and that an indictment

returned by a Federal grand jury, before whom such special assistants to the Attorney General appeared and conducted the proceedings, should be quashed upon motion. The court further stated at pp. 865-866 of the opinion: "The wide difference in the power of District Attorneys and the Attorney General was stated, in 1868 in the Confiscation Cases. 7 Wall. 457, 19 L. Ed. 196, where Mr. Justice Clifford said:

> " 'Public prosecutions, until they come before the court to which they are returnable, are within the exclusive direction of the District Attorney, and even after they are entered in court they are so far under his control that he may enter a nolle prosequi at any time before the jury is impaneled for the trial of the case, except in cases where it is otherwise provided in some act of Congress. * * * Settled rule is that those courts will not recognize any suit, civil or criminal, as regularly before them, if prosecuted in the name and for the benefit of the United States, unless the same is represented by the District Attorney, or some one designated by him to attend to such business, in his absence, as may appertain to the duties of his office.' "

We now proceed with decisions of the Courts pertaining to that Act, with respect to appearance before grand juries of special assistants to the United States Attorney General.

In the case of United States v. Virginia Carolina Chemical Company et al. (cited by Respondent), (C. C. M. D. Tenn. 1908), 163 Fed. 66, at pages 74 and 75, the Court said:

"Here we have Congress, after this indictment was found, enacting a law authorizing the Attorney General to do the very thing that was attempted to be done in this

case; that is, appoint special assistants to the district attorneys to assist them in discharging their duties in grand jury proceedings. Mr. Gillet, of the House Judiciary Committee, reported the bill from that committee, and therein said:

> 'As the law now stands, only the district attorney has any authority to appear before a grand jury, no matter how important the case may be, and no matter how necessary it may be to the interests of the government to have the assistance of one who is specially or particularly qualified by reason of his peculiar knowledge and skill, to properly present to the grand jury the question being considered by it.'

"He understood, and Congress understood, that at that time only the district attorneys had authority to appear before a grand jury, no matter how important the case may be.

"Why pass this act, if it was previously the law? This question was asked by Mr. Justice Strong, in Bath County v. Amy, 13 Wall. 249, 20 L. Ed. 539, in discussing the eleventh and fourteenth sections of the Judiciary Act of 1789 (Act Sept. 24, 1789, c. 20, 1 Stat. 78, 81), where it was insisted the power to issue certain writs was given by section 11, and wherein by said section 14 that power was expressly granted, and he inquires:

> 'Why make this grant if it had been previously made in the eleventh section?'

"Had the Attorney General been authorized to appoint and commission special assistants to the district attorneys, with authority to conduct proceedings before the grand juries of the country, the act of June 30, 1906, would not have been passed. There would have been no need for it. It seems needless to add that, if the contention of counsel

for the government as to the law prior to the passage of the act of June 30, 1906, is correct, that act would be but declaratory thereof, and it would in no way affect it. The court, however, does not agree with counsel for the government in the contention that the act of June 30th was the law prior to that date. It follows therefore that the court is of the opinion that the Attorney General of the United States was not authorized by law to confer upon the special assistants to the district attorney the right to conduct investigations before the grand jury, as was done in this case, and that Messrs. Sanford and Graves were improperly before the grand jury under the facts stated herein above."

In the case at bar, as in the Virginia Carolina Chemical Company case above cited and quoted from, it must be assumed that the grand jury was composed of men of average intelligence and information, who would have known that the United States Government must have been greatly interested in the finding of the indictment, and in the prosecution of the petitioners herein, before it would send two eminent lawyers, the Honorable Mr. Ewing and the Honorable Mr. Schweinhaut, neither of whom was a resident of the District, to Indianapolis to specially appear before the grand jury, take charge of, and conduct the investigation. Their presence and participation in the proceedings, and the fact that the Honorable Mr. Ewing took full and complete charge of the investigation that was being made before the grand jury, was no doubt bound to have impressed the grand jurors, and conveyed to them the information that the Attorney General—the Department of Justice—was exceedingly anxious that an indictment be returned. Who can say how far reaching this influence was, and what effect it had upon the individual jurors when they came to deliberate and to vote upon the

findings, even though the District Attorney was present in the grand jury room. (R. 284.)

On the point of the presence of unauthorized persons appearing before the grand jury, the court said, in the case of Latham, et al. v. United States, (C. C. A. 5, 1915) 226 Fed. 420, at p. 421:

> "The decisions of the courts on this question are not uniform. Different courts have taken different views on this question. From very early times the proceedings before the grand jury, in taking testimony and in deliberating thereon, are required to be held in secret. It is a rule of universal application wherever the system of grand juries are in effect. Wigmore on Evidence, § 2360 et seq.; Greenleaf on Evidence, § 252 et seq. This rule rests upon public policy and in furtherance of justice. It is intended for the protection of the government and the citizen. The rights thus secured cannot be invaded without detriment to each."

Further on page 424, the Court said:

> "The right of the citizen to an investigation by a grand jury pursuant to the law of the land is invaded by the participation of an unauthorized person in such proceedings, be that participation great or small. It is not necessary that participation should be corrupt, or that unfair means were used. If the person participating was unauthorized, it was unlawful. And this would be an unlawful invasion of the right of the citizen, and unless this unlawful invasion is rectified by a proper tribunal at the instance of the citizen, it becomes a justified illegality; and in the words of Judge Hough:
>
> 'A justified illegality, however trivial of itself, is of the highest importance.'"

In the case of United States v. Philadelphia & R. Ry. Co. (D. C. Pa. 1915), 221 Fed. 683, the Court after reviewing the Act of June 30, 1906, held that this section does not authorize the appointment of a special attorney to conduct grand jury proceedings, and the presence of such a person is ground for quashing the indictment.

In this connection, after reviewing the decisions upon the question as to the effect of the presence before the grand jury of a stenographer to take testimony, the Court said:

> "If the presence of a stenographer within the grand jury room for the purpose of taking testimony is improper, can his presence there be justified by the device of having him admitted for that purpose under the guise of an attorney to conduct the proceedings? It is apparent that there was no such intention on the part of Congress, and this Court is not willing to put a construction on the Act of 1906, overruling the established procedure before grand juries, unless moved to do so by the authority of a decision of a higher court."

In the opinion of the District Court (D. C. Conn. 1928), entitled, United States v. Goldman, et al., and reported in 28 Fed. (2d) 424, the Honorable District Judge Thomas had under consideration the Act of June 30, 1906; also the Revised Statutes section 771 (28 U. S. C. A. 485), (set out in the appendix hereto), which defines the duties of District Attorneys; also Revised Statutes Section 363 (5 U. S. C. A. 312), which pertains to counsel to aid District Attorneys, as set out in the appendix hereto; and Revised Statutes Section 366 (43 Stat. 1029, 5 U. S. C. A. 315), authorizing the appointment and prescribing the oath of special attorneys or counsel, which is also set forth in the appendix hereto. On page 427 of

this opinion the Court said: "From these provisions it is clear that special assistants appointed under the authority of these provisions are limited in their functions to assist the United States District Attorney in the *trial* of cases." Apparently that court thus avoided deciding whether that Act was unconstitutional as pertaining to special assistants taking charge of or assisting in grand jury investigations.

In the case of United States v. Virginia Carolina Chemical Company (supra), 163 Fed. 66, further held that the above sections, together with the Act of June 30, 1906, must be construed together, and that the Attorney General was not authorized to appoint special assistants to a District Attorney, with authority to appear before and participate in the proceedings of a grand jury, and the presence of two such attorneys, specially appointed for a particular case before the grand jury, rendered the indictment invalid. It was also held that the proceedings before the grand jury was not the trial of the case, and that, therefore the presence of such assistants before the grand jury was unauthorized. Hence we have in the Act of June 30, 1906 (5 U. S. C. A. 310), an Act which authorizes and permits the Attorney General and/or his assistants to appear before the grand jury to take charge of the investigations, and conduct the same—authorizing the Executive Department of the Government to invade the Judicial Department—appear with the District Attorney, take full charge thereof, to the injury of both the Government and the accused. We again respectfully submit that such an invasion is contrary to the 5th Amendment of the Constitution, that it invades the "due process" provisions of the Constitution, and is detrimental to the interest of the Government and its citizens and is unconstitutional.

It is true as contended by respondent that the Attorney General since 1789 has been vested with plenary powers over the legal affairs of the United States to the full extent that it falls within the Executive Branch of the Government, and he possibly has power under certain conditions to employ other attorneys to assist the District Attorneys, to supervise their conduct and proceedings, but those are the limits of his power in that direction. He is not vested with any power or authority to participate or to cause his assistants to participate, in grand jury investigations.

Respondent also contends that a grand jury investigation is not a judicial function. A grand jury is a constituent part or branch of the Court. (United States v. Kilpatrick, 16 Fed. 765.) At common law the grand jury was a part of the English Courts of Oyer and Terminer, and of jail delivery. Charts v. Terr (Ariz.), 32 Pac. 166; Oshoga v. State, 3 Pinn. (Wis.) 56. Anciently a grand jury was called a "grand inquest." Geiger v. United States, 162 Fed. 844, 845. In its broad sense the word "inquest" is a term including judicial inquiry, generally confined to a judicial inquiry by a jury. People v. Coombs, 36 App. Div. 284, 295; 55 N. Y. S. 276. By the weight of authority the functions of a grand jury, although always ex parte are of a judicial nature; In re: Gardiner, 31 Misc. 364, 64 N. Y. S. 760; Parsons v. Age Herald Publishing Co., 181 Ala. 439; 61 Southern 345. The power and duty of the grand jury to investigate and to judge whether or not an accusation in the form of an indictment is warranted is exclusively for the grand jury. It has power to hear and determine by its judgment whether or not persons or corporations shall be accused of criminal offenses. United States v. Thompson, 251 U. S. 407, 40 S. C. 289; State v. Will, 97 Iowa 58, 65 N. W. 1010;

Commonwealth v. Bannon, 97 Mass. 214; People v. Sweeney, 213 N. Y. 37, 106 N. E. 913; People v. Sexton, 187 N. Y. 495, 80 N. E. 396. It is the duty of the grand jury to inquire into supposed crimes and misdemeanors, and to act upon the evidence forthcoming in the inquiry; "to inquire into the circumstances imports a judicial investigation of the questions of fact." Matter of Gill, 95 App. Div. 174, 175, 88 N. Y. S. 466. Grand juries are under a solemn obligation to "inquire" and make "true presentment" of all infractions of the criminal law which may be given to them in charge or come to the knowledge of any members, touching the service in which they are engaged. In re: Grand Jury, 62 Fed. 840. The duties of the grand jury should be impartially discharged; they are to present no one from envy, hatred, malice, or prejudice. The jurisdiction of a grand jury is co-extensive with and limited by that of the Court in which it is impaneled, and for which it is to make inquiry. United States v. Hill, 26 Fed. Cases No. 15,364; State v. Bindley, 152 Ind. 182, 52 N. E. 804; People v. Northey, 77 Cal. 618.

Grand juries are invested with jurisdiction; the power to summon witnesses; power to hear evidence; and power to judge and determine whether or not accusations should be made. 12 R. C. L. (Grand Jury), Sections 20 and 21, at pp. 1034 to 1037 inclusive, and authorities cited in the footnotes.

A grand jury investigation of a crime that is within its jurisdiction to investigate and to indict is a judicial proceeding in a Court of justice. Craft v. State, 42 Fla. 567, 29 Southern 418; Tindall v. State, 99 Fla. 1132, 128 Southern 494.

A grand jury is a necessary constitutional part of a

court having general criminal jurisdiction. People v. Sheridan, 349 Ill. 202, 181 N. E. 617.

In the case of Re: Dauphin County Grand Jury, decided by the Pennsylvania Supreme Court on May 25, 1938, and found in 2 A (2d) 783, 120 A. L. R., beginning at page 414 of A. L. R., it is said at pages 418 and 419 of A. L. R.:

> "It was also asserted that the Attorney General was the only official who could investigate these charges and that, under the Constitution and the law, a grand jury is not competent to investigate criminal charges aimed at the executive authority." * * *
>
> "We recognize the strength of the language used in the Constitution, article 4, § 2, P. S. Const. art. 4, § 2, providing that the supreme executive power shall be vested in the Governor. We also recognize the effect of Hartranft's Appeal, 85 Pa. 433, 27 Am. Rep. 667, that the official conduct of the executive branch of the government is not to be subjected to investigation by the judiciary. The mere fact a crime is charged in connection with, or as a result of, acts performed by the executive branch of government in its official capacity, is not sufficient to warrant the judiciary in undertaking to inquire broadly into the functioning of that branch. And, we may add, it is basic and fundamental in our system of government that the powers of the three co-ordinated branches of government are and should be separate and kept clear, the one from the other. The judicial branch cannot assume overlordship of the executive or legislative, or vice versa. In Commonwealth v. Widovich, 295 Pa. 311, at page 322, 145 A. 295, at page 299, it was stated:
>
> "Considering the character of the offenses enumerated in the act, the theory of our government forbids such extraordinary exclusive control. While the proscription was undoubtedly to protect all branches of

government, it particularly safeguarded the legislative and executive branches, rather than the judicial. The judiciary is a constituent or co-ordinate part of government; it is not subordinate to other powers, nor does it depend for existence on the legislative will. Its powers come directly from the people, without intervening agency. From the very nature of its time-honored powers, it should be kept a separate, distinct, and independent entity in government to perform those duties which have been immemorially under the common law imposed on it. The domain of the judiciary is in the field of the administration of justice under the law; it interprets, construes, and applies the law. Its powers were possibly the first to be exercised by civilization. Within the compass of its duties it may ascertain and punish crimes against the state, and may at times, in designated instances, operate as a check on other departments of government; but its strength and security come from a complete and absolute separation from political, administrative or ministerial functions." * * *

(Page 433 of same opinion):

"Chief Justice John Marshall said, in United States v. Hill, Fed. Cas. No. 15,364, 1 Brock. 156, that grand juries to not derive their powers from statutes but by implication from the constitution itself, that when courts are invested with criminal jurisdiction, grand juries are 'indispensable instrumentalities' of that jurisdiction, and that 'grand juries are accessories to the criminal jurisdiction of a court, and they have power to act, and are bound to act, so far as they can aid that jurisdiction.'"

We therefore conclude that the Executive Branch of the Government acting through the Attorney General and his aids may independently investigate crimes and misdemeanors, and in the execution of good Government compel District Attorneys to petition for grand juries and

to present before grand juries evidence of crimes and misdemeanors but that the Attorney General and his assistant officers are compelled to act through orders to the United States District Attorneys in presenting matters to a Federal grand jury, and can not themselves either supplant the District Attorney, participate in or be present during, a grand jury investigation.

United States v. Philadelphia R. Co., 221 Fed. 683;
United States v. Rubin, 218 Fed. 245;
United States v. Kilpatrick, 16 Fed. 765;
Wilson v. United States, 229 Fed. 344.

In the case at bar the special assistant to the Attorney General, the Honorable Mr. Ewing, supplanted the District Attorney in his duties before the grand jury, and so he says in effect in his testimony; thereby usurping the power and duties of the District Attorney. No statute of the United States authorizes the Attorney General or his assistants to usurp the authority, powers, and duties of the District Attorney in reference to grand jury proceedings. The Constitution in every respect forbids the usurpation of the power of one coordinate branch of the Government by another.

People v. Flynn, 375 Ill. 366, 31 N. E. (2d) 591 at p. 593;
Tucker v. State, 218 Ind. 614, 35 N. E. (2d) 270.

II

THE SUFFICIENCY OF THE INDICTMENT

The case of United States v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588 is a leading case on criminal procedure, and we take the liberty to quote, in part, from Law Edition, as set out on page 593, as follows:

"In criminal cases, prosecuted under the laws of the United States, the accused has the constitutional right 'to be informed of the nature and cause of the accusation.' Amend. VI. In U. S. v. Mills, 7 Pet. 142, this was construed to mean, that the indictment must set forth the offense 'with clearness and all necessary certainty, to apprise the accused of the crime with which he stands charged'; and in U. S. v. Cook, 17 Wall. 174, 21 L. Ed. 539, that 'Every ingredient of which the offense is composed must be accurately and clearly alleged.' It is an elementary principle of criminal pleading, that where the definition of an offense, whether it be at common law or by statute, 'includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species; it must descend to particulars.' 1 Arch. Cr. Pr. and Pl. 291. The object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time, place and circumstances."

And further—

"Every indictment should charge the crime, which is alleged to have been committed, with precision and certainty, and every ingredient thereof should be accurately and clearly stated; but where the offense is purely statutory, and the words of the statute fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished, it

is sufficient to charge the defendant in the indictment with the acts coming fully within the statutory description, in the substantial words of the statute. Ledbetter v. U. S., 170 U. S. 606, 610, 18 Sup. Ct. 774 and 775, and authorities there cited; 10 Enc. Pl. & Prac. 483, and authorities there cited."

Peters v. United States (C. C. A. 9th, 1899), 94 Fed. 127 at p. 131.

The doctrine thus enunciated in the above cases has been followed consistently by the courts of the land in espionage cases, and we take the liberty of again quoting from an outstanding espionage case, wherein an indictment was returned under the same statute as herein involved. (50 U. S. C. A. 33.) This case is entitled Foster et al. v. United States (C. C. A. 9th, 1918), 253 Fed. 481 at pages 482 and 483:

"In United States v. Simmons, 96 U. S. 360, 24 L. Ed. 819, it was said:

'Where the offense is purely statutory, having no relation to the common law, it is "as a general rule, sufficient in the indictment to charge the defendants with acts coming fully within the statutory description, in the substantial words of the statute, without any further expansion of the matter." 1 Bish. Crim. Proc. Sect. 611, and authorities there cited. But to this general rule there is the qualification, fundamental in the law of criminal procedure, that the accused must be apprised by the indictment, with reasonable certainty, of the nature of the accusation against him, to the end that he may prepare his defense, and plead the judgment as a bar to any subsequent prosecution for the same offense. An indictment not so framed is defective, although it may follow the language of the statute.'

"That rule was reaffirmed in substance in United States v. Carll, 105 U. S. 611, 26 L. Ed. 1135, and in

United States v. Hess, 124 U. S. 483, 8 Sup. Ct. 571, 31 L. Ed. 516, where the court said:

"'The object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent, and these must be set forth in the indictment with reasonable particularity of time, place and circumstances.'

"That doctrine was applied in Keck v. United States, 172 U. S. 434, 19 Sup. Ct. 254, 43 L. Ed. 505, and in Armour Packing Co. v. United States, 209 U. S. 58, 83, 28 Sup. Ct. 428, 52 L. Ed. 681, where the court said:

"'And it is true it is not always sufficient to charge statutory offenses in the language of the statutes, and, where the offense includes generic terms, it is not sufficient that the indictment charge the offense in the same generic terms, but it must state the particulars.'

"This court, in Peters v. United States, 94 Fed. 127, 36 C. C. A. 105, said:

"'Every indictment should charge the crime, which is alleged to have been committed, with precision and certainty, and every ingredient thereof should be accurately and clearly stated; but where the offense is purely statutory, and the words of the statute fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished, it is sufficient to charge the defendant in the indictment with the acts coming fully within the statutory description,

in the substantial words of the statute. * * * The true test of the sufficiency of an indictment is not whether it might possibly have been made more certain, but whether it contains every element of the offense intended to be charged, and sufficiently apprised the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.'

"Of similar import are Ackley v. United States, 200 Fed. 217, 118 C. C. A. 403; Martin v. United States, 168 Fed. 198, 93 C. C. A. 484; Knauer v. United States, 237 Fed. 8, 150 C. C. A. 210; United States v. Bopp (D. C.), 230 Fed. 723."

Counts 1 to 11 inclusive of the indictment set out excerpts from certain articles published in the "Galilean Magazine" in the issues dated December 22 and 29, 1941, January 5, 12, 19 and 26, 1942, February 2, 9, 16, 23, 1942, and March 2, 1942; and also from the pamphlet entitled "We Fight for This Republic Only." The excerpts quoted in the above counts of the indictment were, in part, sentences, or parts of sentences, taken from the main body of the article. They were separated from that to which they rightfully belonged. At this we are reminded of a quotation from Shakespeare wherein it was said: "The devil can quote scriptures for his own purpose." That is to say that any point can be proven by the scriptures by separating the words of the scriptures applicable thereto from that to which they rightfully belong. The separation of the words quoted in the first eleven counts of the indictment, when viewed alone, conveys a meaning that was not intended by the author. When thus separated, they convey the meaning that the words are a direct attack upon the Government of the United States. When,

on the contrary, we submit, they are viewed in the light of the whole article, viewed in connection with the words of the author, which were written before and after the excerpts, they then clearly show criticism of the Administration. These counts then follow with a legal conclusion that the petitioners by reason of the words quoted in the various counts of the indictment, "did knowingly, wilfully, unlawfully and feloniously make and convey false reports and false statements with intent * * * to interfere with the operation and success of the military and naval forces of the United States and to promote the success of its enemies * * *" and—

> "did wilfully, knowingly, unlawfully and feloniously cause, and attempt to cause, insubordination, disloyalty, mutiny and refusal of duty in the military and naval forces of the United States, to the injury of the United States * * *"

and—

> "did wilfully, knowingly, unlawfully and feloniously obstruct the recruiting and enlistment service of the United States, to the injury of the United States * * *."

Neither count of the indictment charges the crime, which is attempted to be alleged to have been committed, with precision and certainty. Every ingredient thereof should have been accurately and clearly stated. Each count of the indictment should have contained every element of the offense intended to be charged, so that they would sufficiently apprise the petitioners of what they must be prepared to meet, and in doing so, each count of the indictment, where it was alleged that the quoted statements were false, should state or show what was the truth, and wherein the petitioners, by such statements, interfered with the operation and success of the military and naval

forces, and wherein the quoted statements promoted the success of the enemies of the United States, and when and where the quoted statements *caused* insubordination, disloyalty, mutiny, and refusal of duty in the military and naval forces of the United States, and who, as a result of said excerpts set out in Count 10 of the indictment was guilty of insubordination, disloyalty, mutiny and refused duty in the military and naval forces of the United States. The first eleven counts of the indictment contain conclusions of law, speculations and suppositions, and do not allege facts with reasonable particularity of time, place and circumstances. The indictment is not specific and definite in that it does not show that the excerpts quoted in the counts thereof were reasonably calculated to create public fear and alarm and that they would interfere with the operations of the men in the Army and Navy who may be stationed in this country or in the far distance. These articles, however, may create anger, disgust and a desire to punish the author, but that is not seditious. The statute (50 U. S. C. A. 33)

> "* * * does not create the crime of attempting to obstruct, but only the crime of actual obstruction, and when causing injury to the service. Whenever Congress intended that attempted obstructions should be a crime, it plainly said so, as may be seen in the statute making it a crime to attempt to obstruct the due administration of justice. Section 135, Penal Code."
>
> United States v. Hall (D. C. D. M. 1918), 248 Fed. 150 at p. 153.

Count 12 of the indictment does not show how or through what medium, representative, agent or employe, the corporation was supposed to have conspired. Petitioners

Pelley, Brown and Henderson are named as co-defendants, but it is not averred in this count that either of them represented the corporation in coming to an unlawful agreement; it is simply averred by conclusions of law that the corporation conspired with them and all with each other. The indictment alleges that petitioner Pelley was President, petitioner Brown was Secretary and petitioner Henderson was Treasurer, and no authority is shown for either to have represented the corporation. There was nothing inherent in their offices which would authorize them so to do. Looking at it from another angle, can it be said that petitioner Pelley, as President of the corporation, conspired with himself as an individual; or that petitioner Brown, as Secretary of the corporation, conspired with himself as an individual; or that petitioner Henderson, as Treasurer of the corporation, conspired with herself as an individual, or that the three above named officers of the corporation conspired with themselves and among themselves. This 12th Count of the indictment is certainly demurrable for the reason that it was not specific, certain and definite and states only conclusions of law. The same would apply to the first eleven counts of the indictment.

It is axiomatic that statutes creating and defining crimes cannot be extended by intendment, and that no act, however wrongful, can be punished unless it comes clearly within the terms of the statute. There can be no constructive offenses. It follows therefore that an indictment must show enough by way of averment of facts to demonstrate that the case is one which comes clearly, plainly and unmistakably within the statute.

Todd v. United States, 158 U. S. 278, 282, 39 L. Ed. 982, 15 S. C. 889;

United States v. Bathgate, 246 U. S. 220, 62 L. Ed. 676, 38 S. C. 269;
United States v. Lacher, 134 U. S. 624, 33 L. Ed. 1080, 10 S. C. 625.

III

THE MOTION FOR BILL OF PARTICULARS

The respondent does not discuss this feature of the case, and if respondent is correct in its contention that the indictment was not demurrable, then a bill of particulars should have been afforded the petitioners, in order that they might have intelligently investigated the charges against them so as to have understood clearly the nature thereof. If the indictment was good, a bill of particulars was their only remedy as against the conclusions, recitals, and uncertainties of the various counts, which have been already pointed out in our discussion of the sufficiency thereof. The petitioners were entitled to know, for instance, where, they were charged with having caused subordination, mutiny, and refusal of military and naval duty, as the result of the writing and publishing of the articles which were in criticism of the administration and its policies. The indictment left the petitioners to speculate, surmise, and guess as to what would actually be presented against them, so that they were not enabled to anticipate the charges with which they would be confronted. We therefore respectfully contend that their motions for bill of particulars should have been sustained.

IV

THE ERROR IN THE ADMISSION OF EVIDENCE

1. "The Door to Revelation" and other publications prior to the war were not properly received in evidence.

The indictment, in all of its counts, is predicated entirely upon that which was alleged to have occurred between December 8, 1941, and the time of the indictment. The first publication alleged to have been seditious is dated in Count 1 of the indictment as "on or about the 22nd day of December, 1941." Count 2 deals with the publication of the 29th day of December, 1941; Count 3, with the publication of January 5, 1942; Count 4, with the publication of January 12, 1942; Count 5, with the publication of January 19, 1942; Count 7, with the publication of February 16, 1942; Count 8, with the publication of February 23, 1942. Count 9 deals with the publication alleged to have been made in February, March and April of 1942. Count 10 deals with all of said publications beginning on January 27, 1941, to and including March 2, 1942. Count 11 deals with all of said publications. Count 12, which is the conspiracy count, definitely avers that the conspiracy began on December 8, 1941, and deals with certain publications only.

"The Door to Revelation, an Autobiography by William Dudley Pelley," was written by the defendant Pelley and copyrighted by him in 1939, and was printed at his plant in Asheville, N. C. There is no evidence that the petitioner Brown had anything to do with it at all. The petitioner, Fellowship Press, Inc., was not even in existence at that time—it was incorporated on November 25, 1940. (R. 373.)

The Autobiography necessarily was written in the past

tense and recounted, among other things, the revelation, or spiritual communication, which the author, petitioner Pelley, said, in his book, came to him—"One night in August, 1929." (R. 308.) In this part of the book he related that he was sitting by himself "in evening clothes and stopped my thinking consciously. Presently came 'the voice of the oracle.' "

> "Deeper and deeper I sank into reverie. Clearer and clearer came the reasoning Intelligence * * *"
>
> " 'In three years or thereabout, you will find yourself at the head of a national vigilante organization, a quasi-military force, which you will project and bring to strange flower. But not as men might hope. Not as you yourself might conceive at its inception. Vast overturning of society must come first. Man will be assailed as he has never been assailed. * * *' "
>
> " 'When will it happen? * * * listen to the Time * * *' "
>
> " 'Over in Europe at this moment exists a young Austrian * * * By trade he is a painter * * * He is coming to the head of the German people * * * His work is not yours, for his is strictly political * * * Yours is economic, but spiritual as well. He will become the great power in Central Europe. That power of his may extend over Russia, overthrowing there the Legions of Darkness. The day that this man ascends into the chancellorship of the German people, do you take it as your time-signal to launch your organization in America.' "
>
> "I saw eight-column headlines. Curiously I picked it up. The date was January 30, 1933. And screaming from the page were the significant words—
>
> ADOLPH HITLER BECOMES GERMAN CHANCELLOR
>
> "I looked at the lines. I read them again. I sought to comprehend them. Something clicked in my brain!

"I laid the paper down. The prophecy heard that night in the 53rd Street flat before going up to Mrs. Leslie's was working.

"Tomorrow, I announced, we have the Silvershirts."

In ruling upon the admissibility of this Autobiography, the honorable Trial Judge, in the presence of the Jury, stated, in effect, that he thought that the book was admissible as against petitioner Pelley to show what was in the mind of the petitioner. "The fact that there are other defendants, of course, does not make it incompetent. It may be incompetent as to the other defendants, excepting as to the conspiracy count, but it is certainly competent as against the one who is the author of the book." (R. p. 307.)

That this evidence was of an extremely damaging and prejudicial character, there can be no doubt. It implanted in the minds of the Jury the fact that in 1939, and previously thereto, the petitioner Pelley was an admirer of Hitler in his rise to the head of the German Government. It should be borne in mind that a great many of the American people were prejudiced against Hitler from the very start of his rise, and that prejudice grew to enormous proportions even before the time he began to wantonly attack surrounding and smaller nations. The prejudice was fanned to a flame by his encroachment upon other central countries of Europe. If this prejudice was by the article so implanted in the minds of the jurors, a fair trial thereafter became impossible, and only a verdict of guilty could be expected, anything else, notwithstanding.

Regardless of our feelings and opinions concerning the infamy of Hitler and his inexcusable barbaric acts, Ameri-

cans had the right to think as they pleased about him and the Germans previous to the declaration of war between our country and Germany. Before the war Americans had the constitutional right to speak and write their opinions concerning Hitler and the Germans, regardless of whether or not their words or writings agreed with the public opinion of the majority, and it was no violation of law at that time.

However, a Jury of laymen, untrained in the science of evidence and unversed in law, could not be expected to separate this prejudicial matter from that which was proven as bearing upon the averments of the indictment, and such a Jury could not be expected not to use this evidence to supplant a failure of proof by the Government in such a case.

Of course, since intent was an essential element to be proven under each of the counts of the indictment, because intent was made an essential element of the offenses sought to be charged, by statute, it became necessary for the Government to do more than merely introduce into evidence the articles published. It was required to go further and show that these articles were published for the express criminal purpose of interfering with the military and naval forces of the United States, as charged in the indictment.

As is said in Wharton's Criminal Evidence (11th Ed.), Vol. 2, Section 931—

> "Where a specific intent constitutes an essential ingredient of the crime charged it must be established beyond a reasonable doubt to warrant conviction. This may be done by direct or circumstantial evidence." (Citing numerous authorities in the footnotes on pages 1625 and 1626.)

The query arises as to whether criminal intent to violate the Sedition Act, charged to have occurred in the latter part of 1941 and the early part of 1942, after war was declared on December 8, 1941, could be proven by the circumstances that back in 1939 and theretofore the author of an autobiography had recounted a dream, revelation, or the voice of an oracle, wherein certain things were predicted, a part of which subsequently came true according to the prediction.

Intent can sometimes be shown by the proof of other similar crimes, but it was not a crime in 1939 to admire Hitler and praise him.

On the trial of a defendant for violation of the Espionage Act, by making false reports and doing other acts with intent to interfere with the prosecution of the war, it was held to be prejudicial to admit evidence of threats made by him against the President, not connected with the acts with which he was charged.

Hall v. United States, 256 F. (4th) 748, at p. 750.

In the Hall case, the Court said that such evidence

> "could only create the impression that, in addition to the other offenses charged, defendant was disloyal to the Government * * * The introduction of this evidence would, of necessity, tend to create a false impression upon the minds of the jury, who would unconsciously reach the conclusion that one guilty of making such an unjustified attack upon the President must naturally be guilty of offenses wherein he was charged with being unmindful of the duty that he owed his country."

The Court quoted from Thompson v. United States, 144 Fed. 16, 75 C. C. A. 174, and from the case of People v. Molineux, 168 N. Y. 264, 61 N. E. 286, and then stated:

> "If this were not the rule, there would be no guaranty for the life or liberty of an individual, and this would be especially true in time of war, as in this instance, when the Government is involved, or on other occasions when public sentiment might be aroused as to a particular question."

> "There is no occasion to question the general rule which excludes all evidence of collateral offenses. * * * evidence of the commission of one crime in and of itself has no legitimate tendency to prove the commission of another crime." (Thompson v. United States, 144 Fed. 16, 75 C. C. A. 174.)

The intent with which we are dealing here is, to interfere with the operation and success of the military and naval forces, to cause, or attempt to cause, insubordination, disloyalty and mutiny in those forces, or to wilfully obstruct the enlistment service, to the injury of the United States when the United States is at war. That intent could be properly proven by circumstances *existing* at or near the time of the publications in question, and having a rational connection therewith.

If the articles quoted in the indictment, upon their faces, had been in the nature of appeal to soldiers and sailors to refuse duty or engage in mutiny or insurrection, or in the nature of an appeal to draftees not to register, such as occurred in the Debbs case, it would not have been necessary for the Government to have attempted to establish intent by circumstantial evidence. The Government recognized that the articles were not seditious upon their faces, and in its extremity in trying to show that the articles were printed for the purpose of affecting military and naval forces, the plaintiff went back into times far remote from the times mentioned in the indictment. If the articles mentioned in the indictment had been pub-

lished for any other purpose than of affecting the military and naval forces, there could be no proper conviction under the Sedition Statute of them, no matter how scandalous or reprehensible they may have been, and no matter how greatly they may have offended the senses of loyal citizens.

No connection of any kind was shown between the Autobiography of Pelley and the articles set forth in the indictment. In Wharton's Criminal Evidence (11th Ad.) Sec. 222, p. 262 and footnote 11, it is said: "No facts are relevant or admissable which do not afford a reasonable presumption, or inference, as to the principal fact in issue, or which do not make more or less probable such an hypothesis. Evidence is admissible if it tends to prove the issue, or to constitute a link in the chain of proof; and this seems to be the limit, and excludes all evidence of collateral facts, or those which are incapable of affording any reasonable presumption or inference as to the principal fact or matter in dispute. As stated by Mr. Greenleaf,—

> "Such evidence tends to draw away the minds of the jurors from the point in issue and to excite prejudice and mislead them." (State v. Beaudet, 53 Con. 536, 4A 237, 55 Am. Rep. 155.)

It was legally impossible for criminal intent to have been formed prior to the declaration of war. There could have been no criminal intent until it was possible to commit a crime. The Sedition Statute was not in force until December 8, 1941, as affected by the present war. No matter what was in the minds of either of the defendants previous to the declaration of war, such was not, per se, contrary to law and could have no logical bearing upon what was in their minds at the time the articles quoted in the indictment were published.

The articles that were published were not, per se, contrary to law either. As was said in the case of Frohwerk v. United States, 249 U. S. 204, 39 Sup. Ct. at page 251—

> "We do not lose our right to condemn either measures or men because the country is at war."

And as stated by Abraham Lincoln in his speech of June 12, 1848:

> "There is an important sense in which the Government is distinct from the Administration. One is perpetual, the other temporary and changeable. A man many be loyal to his Government and yet oppose the peculiar principles and methods of the Administration."

From the nature and tone of the articles set forth in the indictment, the petitioner Pelley, apparently, was highly incensed because the United States did not keep out of war; he thought the war was provoked by the Lease-Lend Act, and other aids and affronts to belligerent nations. He exercised what he thought came within the "freedom of the press" and his vehemence is pointed throughout in criticism of various acts of the Administration which he considered had brought the United States into the conflict.

As to the question of whether or not the Autobiography is relevant to the charge of conspiracy, as was said in Wharton's Criminal Evidence (11th Ed.), Vol. 2, Section 711—

> "While the acts and declarations of one conspirator during the existence of the conspiracy are competent against his co-conspirators, no act or declaration made before the inception of the conspiracy may be binding, or given in evidence against the co-conspirators on trial." (Citing Brown v. United States, 150 U. S. 93, 14 Sup. Ct. 37; Collenger v. United States (C. C. A. 7th) 50 Fed. (2nd) 345, Writ of Certiorari denied in

234 U. S. 654; and cases are cited from Illinois, Iowa Kentucky, Michigan, New York, Oklahoma and Texas.)

The 12th Count of the indictment charges that the petitioners—

> "while the United States was at war as aforesaid, and continuously from December 8, 1941, up to the date of this indictment, did wilfully, knowingly, unlawfully, and feloniously conspire," etc.

Thus the conspiracy charged in the indictment did not commence, and could not have commenced prior to December 8, 1941.

The petitioner Brown was bound in the eyes of the Jury by this Autobiography of Pelley; and the Fellowship Press, Inc., which was not even in being before 1940, was bound in the eyes of the Jury by this Autobiography which, as we have shown, was highly prejudicial on account of the natural antipathy against Hitler and the Germans.

As his Honor, Circuit Court Judge Alschuler, said in the case of Collenger v. United States and six other defendants (50 Fed. (2d) 7th Cir. 345, at p. 348)—

> "It is elementary that a statement of a conspirator, in order to bind the co-conspirator, must be a statement not made in the formation of the conspiracy, but after the conspiracy is formed, and in furtherance of its objects. It is then admissible against all upon the theory that each then speaks and acts for all, if speaking or acting in furtherance of the objects of the conspiracy. It is too plain for discussion that this statement to the government agent, far from furthering the conspiracy, was made after the conspiracy ended, and with the purpose of exposing it and penalizing the conspirators, and was hearsay as to all the defendants except Orta. When, therefore, the statement had been received in evidence, and the court's attention was then

> called to it by the motion to limit, it was the duty of the court then and there unequivocally to limit its application strictly to the defendant who made the statement. Where there are many defendants on trial charged with a general conspiracy, each is subjected to the hazard of being injuriously affected by alleged acts or statements of some other defendants, incompetent as to all but the ones making the statements. In such situations courts should be ever alert to minimize, so far as possible, the hazard to defendants whom the law does not bind by such statements."

This case also holds that the admission of hearsay statements of one conspirator against the others was not cured by a general charge in respect to the admissibility of statements of co-conspirators.

There can be no question but that a statement of one charged with conspiracy made before the beginning of the conspiracy stands in the same category as a statement of a conspirator made against others made after the conspiracy had ended.

It was just before the Court overruled the objections that it stated that "It may be incompetent as to the other defendants, excepting as to the conspiracy count." (R. 307.)

Instead of limiting the Exhibit No. 13 to the author thereof, the Court, apparently, held that it was competent against all defendants under the Conspiracy Count. (R. 307, 308, 315, 316.)

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2. The "Pelley Weekly," issue of March 4, 1936 (Gov. Ex. 15, R. 501-505), containing the article entitled: "German-Americans Should Support the Commonwealth," and the issue thereof of April 22, 1936 (Gov. Ex. 16, R. 505-506), containing the article entitled: "Pelley Addresses

Germans on National Relationships," are open to the same objections as pointed to Government's Exhibit 13 (the autobiography).

The Honorable Trial Judge, in overruling the objection to Exhibit 15, said:

> "This goes to the intent as I understand it." (R. 500.)

Exhibit 15 was a lengthy appeal to the people of German blood, in the United States, to support petitioner Pelley in his campaign for President on the Christian Party ticket of 1936. Among other things, he said in this article:

> "One Man Can Save Them
>
> "The one man in America who can give the Germans the equitable representation and Square Deal to which they are entitled is Pelley of the new-forming Christian Party.
>
> "What Germans Must Know
>
> "Pelley is a native of Massachusetts, of English-Irish parentage, 45 years old, son of a Methodist clergyman. Most of his life has been spent as a journalist and newspaper publisher. During the war he campaigned with Czech forces in Siberia in the Red Cross and Red Triangle branches of the American forces. In 1934 he married a German wife. He is 100 per cent pro-German in his sympathies * * *.

The last three paragraphs of Exhibit 16 were, over objections, read to the jury (R. 505, 506) as follows:

> "I can assure this audience here tonight that if destiny dictates that I have the opportunity to serve my countrymen as I hope to serve my countrymen, the United States and Germany will confront small difficulty in settling forever any difficulties or misunderstandings which may have arisen in 1917 and

> 1918. * * * And Germany could have fared no worse than she was made to fare in 1918. The day will arrive when the world will universally recognize that it was not a war against Germany which the Allies were fighting but a war against the Jewish elements that used Germany—and Germans—for an Israelite Harvest.
>
> "I trust the day arrives soon when I can sit down with Adolph Hitler personally, on a man to man basis, with great interests in common, and forever terminate whatever differences, debates, or rancors, may exist between our respective countries on a basis of mutual liberations and mutual aspirations.
>
> "I feel certain that the German Chancellor and I will understand one another. The similarity of our background and our efforts could scarcely have it otherwise."

Without argument it is clearly apparent that these articles were very prejudicial to the rights of each of the petitioners.

These exhibits were not at all relevant to the question of intent as charged in the indictment, bearing in mind that the intent charged was to interfere with and obstruct the military and naval forces; and not relevant to conspiracy.

Things are sometimes said in political campaigns, which are not the true sentiments of the writer or speaker. Here the respondent, over the separate objections of each of the petitioners, introduced these "campaign promises," made nearly six years before the war, to show that the defendants intended in December, 1941, and in 1942 to interfere with and obstruct the military and naval forces.

The result undoubtedly was to instill in the minds of the jurors that the petitioner were pro-German and, there-

fore, should be convicted whether or not they intended or made an effort to interfere with or obstruct the forces.

In view of the war excitement there was great danger of a conviction on general principles. The mere accusation itself was liable to cause prejudice and a fair trial was practically impossible considering these prewar exhibits.

Respondent insists that the defendants Fellowship Press, Inc., and Brown were connected with Government's Exhibits 13, 15, and 16 and that such were not hearsay as to them.

We were unable to understand the authority for this position.

Brown was employed by the Pelley magazine organization in 1937 or 1938; he was one of the incorporators, a stockholder, a director, secretary and vice-president of petitioner corporation which came into existence first on November 25, 1940. Still, there was no connection shown between Brown and the Fellowship Press, Inc., with either of these exhibits. These were composed entirely of hearsay as to them and were highly prejudicial.

We disagree with respondent in the contention that the instructions, (pages 560 and 561 of the record), rendered the pre-war exhibits innoxious.

At the time the trial court overruled the separate objections of each of the petitioners, the court announced that the Exhibit 13 was competent on conspiracy and the others on intent without limiting the scope of this evidence. It was not for the jury to decide the competency of the evidence under the court's instructions.

In Collenger v. United States, C. C. A. 7th Circuit, 50 Fed. (2d) 345, at page 349, the court said:

"It is contended for the government that whatever of error there may have been in the admission in evidence of the statements and testimony of conversations, or the failure to limit their application, was obviated or cured by that part of the court's general charge at the close of all the evidence, which was: 'I instruct the jury that the statements of co-conspirators are admissible if made during the conspiracy and in furtherance of the object of the conspiracy and are admissible as against all persons who are in the conspiracy, but that these statements are not to be used for the purpose of establishing the existence of the conspiracy itself.'

"This charge, in effect, put it up to the jury to decide whether the statements and evidence were admissible against the complaining defendants. This was a function of the court, not of the jury. The statements and conversations were but narratives of past events, in no respect attributable to the conspiracy. They were purely hearsay, and inadmissible as to all the defendants save those who made them. It was for the court to pass upon their admissibility, and indeed it did so pass—in overruling objections to their admissibility against the objecting defendants or in denying motions made after they were received in evidence, to so limit their application. These rulings closed the matter so far as the objecting defendants were concerned, and they were not thereafter required to seek further ruling by the court in order to avail of any error in the rulings thereon already made. As we have above suggested, such evidence should on objection or motion have been rejected or stricken out as to the other defendants, when it was evident that it was but hearsay. That was the least the court could have done to protect defendants against whom the statements and evidence were not competent from the serious menace of their influence. The charge given is the statement of a mere abstract principle of law which the jury was quite unqualified to apply to the many defendants and

to the many instances of the reception of such evidence in the course of this lengthy trial.

"Had the charge specifically pointed out that this or that statement received in evidence, or this or that evidence of what a given defendant had related to the witness, was incompetent and not to be used against specifically named defendants, it might perhaps have served sufficiently to have neutralized the virus of the improper admission or refusing to strike. This we need not decide, since the charge given did not serve to guide the jury as to what evidence should be rejected.

"The failure to exclude or limit this evidence may indeed account for Collenger's conviction, apparently upon such a statement alone, concededly incompetent as to him. If such incompetent evidence served to convict him, the mass of evidence of the same kind, improperly received as to other of the defendants, in all probability tended materially to influence the result as to them.

"The government's contention that the statements and evidence were admissible as res gestae is altogether too far-fetched and groundless to merit discussion."

The publications (Exhibits 13, 15 and 16) were not admissible upon the issues of wilfulness and intent.

The questions of wilfulness and intent pertain only to the charges in the indictment—that is to say, the query arose as to whether or not the publications set forth in the indictment were made for the wilful purpose and intention to disrupt the military and naval organizations. The fact that one of the petitioners may have admired Hitler at certain stages of the latter's career, and that he may have had a friendly attitude at one time toward the German people, would not at all tend to prove that he, or anyone

else, proposed, or had the intention to interfere with the military or naval organizations. Such would not tend to show that either one of the petitioners proposed, or intended, to obstruct the recruiting service, or to cause insubordination or insurrection in the armed forces.

We believe that respondent is in error in asserting that the lower court restricted the evidence in question to the issue of intent, and its application to such of petitioners as wrote, published, circulated or distributed it, or assisted or aided in those acts. By the instructions found on pages 560 and 561 of the transcript, the court said:

> "Evidence has been introduced with reference to the organization of 'The Silver Shirt Legion of America, Inc.,' by the defendant, Pelley, the manner in which such organization was perfected and carried out, the intent and the purpose of such organization, the things for which it stood, etc. This evidence was competent as bearing upon the question of intent, it was competent for that purpose, and it should be considered by you for that purpose only.
>
> "Likewise, the articles appearing in 'The Galilean Magazine' and other publications written, published, circulated and distributed by the defendant, Pelley, prior to the declaration of war, and not mentioned in the indictment, if you find that any such articles were so written, published, circulated and distributed, are competent for the same purpose; that is, bearing upon the question of intent in the writing, publishing, circulating and distributing of the articles and passages set forth in the indictment."
>
> "If you find that each of the defendants did not actually write, publish, circulate or distribute the articles and passages in question, but that each of the said defendants assisted or aided in the writing, publishing, circulating and distributing, then, the defend-

ants thus so aiding, if done with the intent heretofore explained to you, would be guilty as a principal."

This statement in the instructions could have meant that if the jury found some of the petitioners did not actually write, publish, circulate or distribute "the articles and passages in question," but aided in writing, publishing, circulating and distributing them, the petitioners so aiding, if done with criminal intent, would be guilty as a principal. It is impossible from the instructions to determine whether the words, "the articles and passages in question" refer to the exhibits which are mentioned as having appeared in the various publications written, published, circulated and distributed by the petitioner Pelley prior to the declaration of war, or whether they refer to the articles quoted in the indictment.

As we have seen, under the Collenger case, these instructions not only left it to the jury to determine the admissibility of the evidence, but such did not constiute a proper restriction of the evidence.

This evidence was not restricted to the issue of intent for the reason that the court had announced that it was admissible on conspiracy. The instructions do not pretend to limit the evidence to any one of the petitioners, but under the instructions, the evidence was open to be considered by the jury as against all.

The publications of 1936 certainly could not have applied to Brown, who was not even employed by the Pelley organization until 1937, or thereafter. Such certainly could not have applied to the corporation, which was not in existence until 1940. The court's instructions, however, permit the jury to apply it to all without any limitation. As was said in the Collenger case, the limitation should have been presented at the time of admission, if the evi-

dence were competent as against anyone. The danger lies in the fact that during and just preceding wars, excitement, prejudice and hatred flare up in the minds of people. Not long ago, a great many people in the United States were incensed at Russia because of her communism. In 1864 and 1865 the American people were perhaps as furious at Great Britain as they are now at Germany and Japan, on account of the fact that the British government built Confederate raiders at the Belfast Navy Yards in Ireland, outfitted those raiders and manned them with British sailors and gunners under the command of Confederate Lieutenants, resulting in a great loss of American lives and shipping, which is recounted in American Histories as pertaining to "The Alabama Affair." Would the fact that an historian, in writing a history in 1939, denounced Great Britain in vehement terms for furnishing ships, arms, men and ammunition to the Confederate States of America, be evidence of intent or conspiracy based upon "isolationist" articles written after the beginning of this war? Would the fact that a great many American magazines and newspapers strongly denounced Russia for her attack on Finland be evidence of intent in case of prosecution for other publications concerning the war policy of the Administration?

It has not been long since that Americans were praising France and lauding the French people and supporting the French effort against the Germans; but since the change of the attitude of the French government, the reverse is true.

The record discloses that instead of the petitioners being tried for wilfully and intentionally disrupting, or attempting to disrupt, the military and naval organizations of the United States, they were in effect tried upon the

issue as to whether or not they were "pro-Axis" in their opinions. The fact that Mr. Pelley organized the Silver Shirts in 1935 or 1936 certainly could have no bearing upon intent, when the uncontradicted testimony shows that this organization was disbanded in 1939, or the early part of 1940. What connection had Brown with the Silver Shirts? What connection had the Fellowship Press, Inc., with the Silver Shirts? What connection had they either with the Silver Shirt movements in 1936. There is no evidence of any connection.

These documents may follow an unvarying pro-Axis pattern, and may be consistent with the mental processes of those responsible for the antagonism to the ideals, purposes and activities of the United States, still they were published long before the war and before there was an "Axis" pattern; under circumstances far different from those existing at the time of the attack on Pearl Harbor.

The cases cited by respondent to support the contention that this evidence is admissible to show intent and wilfulness, are not at all in point on this question. There is a vast difference between making statements prior to the declaration of war and making statements after the war. The respondent was entitled to prove any statement made by either of the defendants, made after the war began, as against him, or in case of establishing a conspiracy, by evidence against all; but was not entitled to go into the distant past to determine whether or not previous to the war a petitioner or petitioners were pro-Axis in their sympathies.

Respondent cites the Debbs case, 249 U. S., at p. 215, where there was introduced an "Anti War Proclamation and Program," adopted in St. Louis in April, 1917, coupled with testimony that about an hour before his speech Debbs had stated that he approved that platform. Debbs, in his

address to the jury, referred to the Proclamation and Program "with satisfaction and willingness that it should be considered in evidence."

> "Evidence that the defendant accepted this view and this declaration of his duties at the time that he made his speech is evidence that if in that speech he used words tending to obstruct the recruiting service he meant that they should have that effect."

The court also said:

> "We should add that the jury were most carefully instructed that they could not find the defendant guilty for advocacy of any of his opinions unless the words used had as their natural tendency and reasonably probable effect to obstruct the recruiting service, &c., and unless the defendant had the specific intent to do so in his mind."

In the Williamson case cited by respondent, there was evidence of another similar crime, consisting of a previous attempt to acquire State School lands by unlawful methods, which was held admissible on a trial for conspiracy to suborn perjury in proceedings for the purchase of public land under the "Timber and Stone Act," as tending to establish guilty intent, purpose, design or knowledge on the part of the alleged conspirators. Respondent practically admits that the Exhibits 13, 15 and 16 were not admissible upon conspiracy; and, of course, they were not, because the conspiracy was charged to have commenced on the 8th day of December, 1941, and there was no evidence of any connection of any defendant, except Pelley, with those articles.

3. The Testimony of Government witnesses Graves, Lasswell and Richter was not properly admitted.

This testimony had no relation to, or bearing upon the

issues in this case, and the introduction of the 14 propaganda themes, and the comparison between them and certain words, parts and portions of the articles set forth in the indictment was wholly improper as a matter of the witnesses' opinions. The whole matter was incompetent from its inception as tending to prove anything in this case, for such constitutes hearsay as to each of the defendants. If any of this evidence had been proper at all, and a comparison called for, such would have had to have been made by the jury. Respondent has not produced any authorities or any logical reason why these petitioners should have been tried upon what the Germans said in their propaganda and what certain self-styled experts thought was a proper comparison to be made between German propaganda and the articles set forth in the indictment.

Mrs. Richter's testimony was purely in the nature of conclusions as to what the newspaper sentiment was, and as we have already shown, was wholly incompetent upon any issue in this case.

This evidence was very damaging in that it led the jury to believe that such was competent upon some issues of the case and it consisted of conclusions based upon hundreds of newspaper editorials and articles, none of which were made by, in the presence of, with the consent or knowledge of any of the defendants, and such was not competent for any valid reason.

When we consider these prejudicial errors together with the statements in the closing argument of counsel for the Government, to-wit: "Not long ago we tried a man in this court for murder—for murdering an F.B.I. agent; he also murdered his mother. But, Pelley, your heart is far blacker than his, you wanted to murder your fellow-countrymen. You are a traitor to your Government. You are a Benedict

Arnold, an Aaron Burr." (R. p. 600.) We think it is manifest that the petitioners were denied a fair and impartial trial.

CONCLUSION

Because of the issues arising upon the record, the conflict of decisions pertaining thereto, the constitutional questions involved, and the apparent denial of the rights of petitioners, we respectfully submit that the Petition for rehearing should be granted and allowed.

Oscar F. Smith,
108 E. Washington Street,
Indianapolis, Indiana,
Floyd G. Christian,
19½ E. Logan Street,
Noblesville, Indiana,
Counsel for Petitioners.

APPENDIX

Revised Statutes, Section 771 (28 U. S. C. A. 485), provides:

> "It shall be the duty of every district attorney to prosecute, in his district, all delinquents for crimes and offenses cognizable under the authority of the United States, and all civil actions in which the United States are concerned, and, unless otherwise instructed by the Secretary of the Treasury, to appear in behalf of the defendants in all suits or proceedings pending in his district against collectors, or other officers of the revenue, for any act done by them or for the recovery of any money exacted by or paid to such officers, and by them paid into the Treasury."

Revised Statutes, Section 363 (5 U. S. C. A. 312), provides:

> "The Attorney General shall, whenever in his opinion the public interest requires it, employ and retain, in the name of the United States, such attorneys and counselors at law as he may think necessary to assist the district attorneys in the discharge of their duties, and shall stipulate with such assistant attorneys and counsel the amount of compensation, and shall have supervision of their conduct and proceedings."

Revised Statutes, Section 366 (43 Stat. 1029; 5 U. S. C. A. 315), provides:

> "Every attorney or counselor who is specially retained, under the authority of the Department of Justice, to assist in the trial of any case in which the Government is interested, shall receive a commission from the head of such department, as a special assistant to the Attorney General, or to some one of the district attorneys, as the nature of the appointment may require; and shall take the oath required by law

to be taken by the district attorneys, and shall be subject to all the liabilities imposed upon them by law. Foreign counsel employed by the Attorney General in special cases shall not be required to take the oath required by this section."

Act of Congress of June 30, 1906, Chapter 3935 (34 Stat. 816, 5 U. S. C. A. 310), provides:

"The Attorney General or any officer of the Department of Justice, or any attorney or counselor specially appointed by the Attorney General under any provision of law, may, when thereunto specifically directed by the Attorney General, conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which district attorneys may be by law authorized to conduct, whether or not he or they be residents of the district in which such proceeding is brought."

CERTIFICATE OF COUNSEL

STATE OF INDIANA
COUNTY OF MARION ss.

OSCAR F. SMITH and FLOYD G. CHRISTIAN, each for himself, being first duly sworn, deposes and says:

1. That they are attorneys-at-law engaged in the active practice of their profession at Indianapolis, Indiana, with offices at 108 East Washington Building, Room No. 1302, in the city of Indianapolis, and 19½ East Logan Street in the town of Noblesville, Indiana, and that they are the attorneys for the petitioners herein before the Supreme Court of the United States in causes numbered 645, 646, and 647, October Term, 1942, entitled, William Dudley Pelley, Petitioner and Appellant Below, vs. United States of America, Respondent and Appellee Below, Lawrence A. Brown, Petitioner and Appellant Below, vs. United States of America, Respondent and Appellee Below, and Fellowship Press, Inc., Petitioner and Appellant Below, vs. United States of America, Respondent and Appellee Below; that as counsel they each prepared and assisted one another in the preparation of the joint and separate petition for rehearing in said causes numbered 645, 646, and 647, October Term, 1942, entitled William Dudley Pelley, Petitioner and Appellant Below, vs. United States of America, Respondent and Appellee Below; Lawrence A. Brown, Petitioner and Appellant Below, vs. United States of America, Respondent and Appellee Below, and Fellowship Press, Inc., Petitioner and Appellant Below, vs. United States of America, Respondent and Appellee Below, to which this affidavit is attached, and that they each have read said petition and are familiar with the contents thereof;

2. That said petition for rehearing of said William

Dudley Pelley, Lawrence A. Brown, and Fellowship Press, Inc., filed in Causes numbered 645, 646, and 647, October Term, 1942, entitled William Dudley Pelley, Petitioner and Appellant Below, vs. United States of America, Respondent and Appellee Below; Lawrence A. Brown, Petitioner and Appellant Below, vs. United States of America, Respondent and Appellee Below, and Fellowship Press, Inc., Petitioner and Appellant Below, vs. United States of America, Respondent and Appellee Below, is presented in good faith and not for delay.

Further affiants sayeth not.

OSCAR F. SMITH,

FLOYD G. CHRISTIAN,

Subscribed and sworn to before me, a notary public in and for said County and State, this 5th day of March, 1943.

(Seal)

ELSIE M. RUARK.
Notary Public.

My commission expires
April 26, 1944.